

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re:

CASE NO. 02-21047

JAMES LOUIS HENNING,

Debtor.

DECISION & ORDER

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BACKGROUND

On March 25, 2002, James Louis Henning (the "Debtor") filed a petition initiating a Chapter 13 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) in addition to his personal residence, he was the owner, individually or jointly with Anthony Ferreri, Jr., of forty-nine rental properties in the City of Rochester, New York (the "City"); (2) forty-one of these rental properties had negative equity, in that the outstanding mortgages and liens against them exceeded their value; (3) there were significant real estate taxes due to the City and the County of Monroe on a number of these rental properties, and there were also a number of code violation fees due to the City; and (4) the Debtor intended to surrender forty of the rental properties to the respective mortgage holders in full satisfaction of the indebtedness due against them.

On November 5, 2002, after a number of mortgage holders had moved for and been granted relief from the automatic stay so that they could pursue their lien rights against their respective

properties, the Debtor made a motion (the "Abandonment Motion") which requested that the Court enter an order, pursuant to Section 554(a),<sup>1</sup> permitting the Chapter 13 Trustee to abandon his interest in forty-one of the rental properties.

The Abandonment Motion indicated that letters had been sent to the mortgage holders of the property to be abandoned which stated that it was the Debtor's intention to surrender each property in full satisfaction of any and all mortgage indebtedness due against the property, and that no objections had been received from any of the mortgage holders. The Motion further indicated that there was no equity in any of the properties to be surrendered and abandoned and, therefore, they were burdensome to the Chapter 13 estate.

Prior to the return date of the Abandonment Motion, the City filed Opposition to the Motion, so that on September 18, 2002, the Court conducted a hearing. At the hearing, the Court found that: (1) the Chapter 13 estate's interest in each of the properties should be abandoned, since there was no equity in them, no positive cash flow and each was burdensome to the estate; (2) in accordance

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<sup>1</sup> Section 554(a) provides that:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 554(a) (2005).

with the Court's decision in *In re Flood*, 234 B.R. 286 (Bankr. W.D.N.Y. 1999) ("*Flood*"), notwithstanding the abandonment, until the Debtor disposed of the properties, he would continue to own them and be responsible for them;<sup>2</sup> and (3) consistent with this Court's policy in connection with the abandonment of a bankruptcy estate's interest in property that may have conditions that present imminent danger to the public, See *In re Red Bird Development*, Chapter 11 Case No. 95-22791 (W.D.N.Y. May 8, 1997) ("*Red Bird*"), the Court indicated that, to the extent that any of the properties that the Debtor continued to own subsequent to the abandonment, but while he remained in Chapter 13, presented an imminent danger to the public, the City could: (a) take such steps as were necessary to prevent imminent danger to the public; and (b) file a post-petition claim for the reimbursement of the expenses incurred to prevent imminent danger to the public, which claims would be

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<sup>2</sup> In *Flood*, the Court stated, "Debtors cannot avoid the responsibility and potential liability that continues to flow from owning unsafe or dangerous real property simply by filing a Chapter 7 case. Unless the property is disposed of by the Chapter 7 trustee, it will be abandoned or deemed abandoned back to the debtor who then will continue once again to have all of the responsibilities and liabilities that result from ownership, including those that result if the property continues to be unsafe and dangerous. In this case, the Debtor's indication on the Statement of Intention that he intended to surrender the property to the mortgage holders, has no legal effect on his continuing ownership of the property after it was abandoned back to him. In fact, it appears that the Debtor did nothing to actually surrender the property to any of the mortgage holders by, for example, offering any one of them a deed in lieu of foreclosure."

entitled to a priority and would be paid from estate funds prior to the payment of any prepetition claims.

At the hearing, the Court did not in any way indicate that any post-petition liability incurred by the Debtor because of unsafe conditions at an abandoned but still owned property would be discharged in his Chapter 13 proceeding. However, to the extent that estate funds were used to reimburse the City because it had cured, in whole or in part, any post-petition code violations for unsafe conditions that presented an imminent danger to the public, the Debtor would receive a credit for those payments.

On July 14, 2003, the Court entered an Order (the "Abandonment Order") which: (1) permitted the estate to abandon the properties included in the Abandonment Motion; (2) lifted the automatic stay to permit the City to enforce its rights as to those properties; and (3) provided that the abandonment was without prejudice to the City's rights to present post-petition claims for monies expended to prevent imminent danger to the public.<sup>3</sup>

The Debtor subsequently completed the terms of his Chapter 13 Plan, and on October 30, 2003, the Court entered an Order which discharged the Debtor from all of his debts provided for by the Plan.

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<sup>3</sup> By a July 22, 2003 letter, the City indicated it had no objection to the Abandonment Order.

On February 4, 2005, the Debtor filed a motion (the "Determination Motion") which requested that the Court determine whether two judgments about to be entered in favor of the City against the Debtor in the Supreme Court, Monroe County (the "Supreme Court"), were void because of the provisions of the Abandonment Order.

The Determination Motion alleged that: (1) despite the Abandonment Order, which expressly required the City to present claims to the Bankruptcy Court for any liability incurred by the Debtor post-petition in connection with the abandoned properties, the City failed to file any claims for any such alleged post-petition liability; (2) on or about October 12, 2004, the City filed two Notices of Petition with the Supreme Court which requested that judgments be entered against the Debtor for the post-petition demolition costs associated with his Heidelberg Street property in the amount of \$13,455.34 plus interest, and his Bay Street property in the amount of \$6,198.36 plus interest; (3) the Debtor had moved in the Supreme Court to dismiss the Petitions (the "Dismissal Motion") on the grounds that by failing to comply with the requirement of the Abandonment Order that the City file post-petition claims in connection with these properties, the City failed to preserve its right to seek reimbursement for the

demolition costs; (4) the City opposed the Debtor's Dismissal Motion based upon the *Flood* decision; (5) the Debtor asserted in the Supreme Court that *Flood* was distinguishable because, unlike in *Flood*, in the Debtor's case the Abandonment Order required the City to file post-petition claims for any costs that it incurred in connection with the prevention of imminent danger to the public; (6) on January 13, 2005, the Supreme Court denied the Debtor's Dismissal Motion and granted the City the requested judgments against the Debtor; and (7) the Court should determine that the judgments were void because the City violated the Abandonment Order.

#### **DISCUSSION**

The Determination Motion is denied for the following reasons:

1. It is clear from the transcript of the September 18, 2002 hearing and the Abandonment Order that: (a) even after the interests of the estate in the properties covered by the Abandonment Motion were abandoned, as determined by the Court in *Flood*, the Debtor would continue to be: (i) the owner of each of the abandoned properties until they were sold, foreclosed upon, surrendered to the lien holders with the lien holder's consent or otherwise effectively and legally disposed

of; and (ii) liable for any and all post-petition and post-abandonment liabilities that he might have incurred or would incur as a result of his continuing ownership of each of the abandoned properties; (b) consistent with the Court's policy, as reaffirmed in *Red Bird*, that when there are unencumbered estate funds available in a Chapter 7, 11 or 13 case pending in this Court, notwithstanding any abandonment of the estate's interest in a property with dangerous conditions that present imminent danger to the public, unencumbered estate funds will be used to pay for the steps necessary to prevent imminent danger to the public, the Court indicated that, to the extent that the City was required to expend funds post-abandonment to cure dangerous conditions at the abandoned properties presenting imminent danger to the public that the Debtor failed to cure, the City could file claims against the Debtor's Chapter 13 estate; (c) at the hearing, there was no certainty that the City would either expend funds or file claims for curing conditions that it believed presented imminent danger to the public post-abandonment, because it was not clear that there were conditions at any of the properties to be abandoned that in fact presented imminent danger to the public as determined by the Court in *Red Bird* and related

cases; and (d) the City could take steps to cure post-petition code violations or other post-petition conditions at the abandoned properties which might not meet the Court's test for presenting imminent danger to the public, but that could nevertheless result in post-petition and post-abandonment liabilities of the Debtor as the continuing owner of the abandoned properties.

2. Based upon the above, the Abandonment Order was made without prejudice to the City's ability to present imminent danger cure claims, but it did not require the City to do so.
3. The Court never intended nor would it have required the City to file post-petition claims, since: (a) under Section 1305 the post-petition claims in question were not otherwise allowable and all post-petition claims are filed at the election of the creditor; (b) the Court did not know whether the City would ever take steps to prevent imminent danger to the public, or if it took steps and expended funds to cure code violations, whether any claims would in fact be allowed by the Court as imminent danger to the public claims; and (c) if the City elected not to file imminent danger claims, the Debtor's unsecured creditors would benefit from not having estate funds used for that purpose.

4. It was never the Court's intention to benefit the Debtor to the detriment of the unsecured creditors by eliminating any post-petition or post-abandonment liability that he may have in connection with the abandoned properties. The Court was simply concerned with insuring that its policy with respect to imminent danger to the public was consistently implemented, so that if there was imminent danger to the public, the City had the opportunity to take such steps as it deemed necessary to prevent such danger and then, to the extent of estate funds available, if it so elected, to be reimbursed.

**CONCLUSION**

The Determination Motion is in all respects denied.

**IT IS SO ORDERED.**

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/s/  
**HON. JOHN C. NINFO, II**  
**CHIEF U.S. BANKRUPTCY JUDGE**

**Dated: March 17, 2005**